BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

GERALD P. KEAN, JR.
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-327
Case No. 76-706

S.S.A. No.

CARLTON FORGE WORKS
(Employer)

Employer Account No.

Office of Appeals No. LA-21359

The employer appealed from the decision of the Administrative Law Judge which held the claimant was not subject to disqualification for unemployment insurance benefits under the provisions of section 1256 of the Unemployment Insurance Code and the employer's reserve account not relieved of benefit charges under section 1032 of the code, on the ground that the claimant voluntarily left his most recent work without good cause.

STATEMENT OF FACTS

Prior to his employment with the employer herein the claimant, who is a metallurgical engineer, was for an extended period of time receiving psychiatric care due to an emotional disturbance. His psychiatrist advised him during the latter part of his treatment to attempt to obtain employment, apparently as a means of assisting the claimant in overcoming his emotional problem. For this reason on or about July 24, 1975, the claimant applied for employment with the employer herein. In completing the application for employment, the claimant stated on the application that he had no physical handicaps and, although there was a space

provided for him to describe any serious illnesses he might have had, the claimant left this portion of the application blank. As a result of his work application the claimant commenced working for this employer on August 18, 1975. During the following few days, the claimant became convinced that he would be emotionally unable to perform the duties of the job. In discussing this situation with his psychiatrist, he was advised by the psychiatrist to leave work. On the basis of this advice the claimant voluntarily terminated his employment with this employer on August 23, 1975 and subsequently filed a claim for unemployment benefits.

It is the contention of the employer that benefits should be denied this claimant and the employer's reserve account should not be chargeable because the employment the claimant obtained with this employer resulted from "false representations to us."

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides for the disqualification of a claimant and sections 1030 and 1032 of the code provide that an employer's reserve account may be relieved of benefit charges if it is found that the claimant voluntarily left his most recent work without good cause or was discharged for misconduct connected with his most recent work.

There is no contention in this matter that the claimant was discharged by the employer. The evidence is clear that the termination of the claimant's employment resulted from the claimant's action of leaving work. Thus, the claimant voluntarily left his work (Appeals Board Decision No. P-B-37). It is necessary, therefore, to decide if the claimant had good cause for so doing.

We have held that if the facts show a real, substantial and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action, then good cause for voluntarily leaving work has been established (Appeals Board Decision No. P-B-27).

In applying this principle, if a claimant's health (physical or mental) is adversely affected by the duties of his job and he leaves work for this reason, he established good cause for leaving work.

The duties of the job that this claimant had with this employer adversely affected his mental or emotional health to the extent that his psychiatrist advised him to leave work. Therefore, this claimant had good cause for leaving work unless it is concluded that his failure, at the outset of his employment, to inform his employer of his emotional condition negated this good cause.

We must point out again that we are not concerned here with whether the claimant was discharged for misconduct connected with his most recent work, but rather, we are concerned with whether this claimant had good cause for voluntarily leaving work. As pointed out above, the work adversely affected the claimant's emotional condition and he was advised by his psychiatrist to leave the work. Thus, the claimant has established good cause for leaving work.

In Appeals Board Decision No. P-B-78, the claimant failed to inform his employer on his work application that he had suffered an injury to his back, and after working on the job he found that he could not perform the duties of the job because of his back condition. There we held that the claimant's failure to inform the employer of his back injury prior to his employment negated any good cause the claimant may have had for leaving work. We reject this philosophy and conclude that in applying the voluntary quit provisions of sections 1256 and 1030 of the code we must consider the situation which caused the claimant to leave his work. Thus, we overrule Appeals Board Decision No. P-B-78.

In response to the employer's contention that the claimant's employment resulted from his misrepresentation, we find that the claimant made no misrepresentation. He merely failed to inform the employer of his emotional condition.

DECISION

The decision of the Administrative Law Judge is affirmed. The claimant is not subject to disqualification under section 1256 of the code. The employer's reserve account is not relieved of charges under section 1032 of the code.

Sacramento, California, May 18, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

CARL A. BRITSCHGI

HARRY K. GRAFE

DISSENTING OPINION

We dissent.

In this case our colleagues reach the result that an employee, who intentionally and materially misrepresents to his prospective employer his physical condition, and thereafter leaves the work by reason of the physical condition which he misrepresented, is nonetheless qualified for unemployment insurance benefits within the meaning of section 1256 of the code. In reaching such result, the majority overrules Appeals Board Decision No. P-B-78 and creates an anomaly in the law of civil fraud wherein the guilty party is rewarded and the innocent party is penalized.

Prefatorily, it must be said that the majority have failed to disclose in their Statement of Facts several relevant, material and pertinent facts which are unrefuted in the record and which are indispensable to a thorough review of this case. First, the majority fail to set forth the fact that the claimant had been certified by his physician as being disabled and unable to work beginning March 25, 1975, and had been drawing state disability insurance benefits since that date.

Second, at the time the claimant applied for a position with the employer, on or about July 24, 1975, the claimant was still being certified by his physician as being disabled and unable to work and was still drawing disability insurance benefits. Third, on the employment application that the claimant filled out for the employer on July 24, 1975, the claimant expressly denied that he had any physical handicaps and left blank the space where he was required to list "Serious Illness and Dates." Fourth, in conjunction with the employment application, the claimant furnished the employer with a resume of the claimant's background and experience, which contained the assertion: "Physical condition: Excellent." (Underscoring added)

Fifth, even after applying for employment with the employer, the claimant continued to be certified by his physician as being disabled and unable to work and continued to draw disability insurance benefits through Sunday, August 17, 1975, the day before the claimant commenced working for the employer. Sixth, immediately after

he terminated his job with the employer on August 22, 1975, the claimant again was certified by his physician as being disabled and unable to work and the claimant again drew disability insurance benefits until such benefits were exhausted on September 27, 1975. Seventh, on September 29, 1975, the claimant's physician declared the claimant was again able to work and the claimant filed his claim for unemployment insurance benefits.

We submit that all of the above facts (which are not disputed in the record) are essential for a proper analysis and disposition of this case. We believe that when the applicable California law is properly applied to these facts, the result must necessarily be a solidification of the rule established in Appeals Board Decision No. P-B-78: that the claimant is disqualified for unemployment insurance benefits under section 1256 of the code.

In Appeals Board Decision No. P-B-78, the then majority of this Board stated as follows:

> ". . . In our opinion, a prospective employee has a duty to make a full disclosure of any facts which may affect his ability to work. If he fails to do so, he is guilty of fraud and should not be permitted to benefit from his wrongful act. . . ."

The majority decision in Appeals Board Decision No. P-B-78 then went on to explain that the "fraud" being alluded to was civil fraud of the nature that has been established in the Law of Contracts in this state, and cited Witkin's Summary of California Law (7th ed.) as its authority. In the six years since Appeals Board Decision No. P-B-78 was adopted, an 8th edition of Witkin's cyclopedic work has been issued, but the rationale remains accurately the same. Moreover, "fraud" in the contractual sense may also give rise to an action in tort for fraud and deceit (Witkin, Vol. 4, § 446, p. 2711). We believe that a thorough exploration of California civil law principles concerning "fraud" is necessary in light of the facts of this case.

"Fraud" in California civil law is either actual or constructive (Civil Code §1571). It may render a

contract void, or may be ground for rescision or reformation (Civil Code sections 1566, 1689, 3399; Seeger v. O'Dell (1941), 18 Cal. 2d 409; Restatement of Contracts, §491). It also gives rise to the remedy of an action for damages for deceit (DeCampos v. State Compensation Insurance Fund (1954), 122 Cal. App. 2d 519).

> "The elements of actual fraud, whether as the basis of the remedy in contract or tort, may be stated as follows: There must be (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act upon it; and such person must (4) act in reliance upon the representation (5) to his damage." (Witkin, Vol. 1, §315, p. 265; see also Harding v. Robinson (1917), 175 C. 534; Wolfe v. Severns (1930), 109 C.A. 476)

Civil Code section 1572 sets forth five types of false representation or concealment, any one of which when committed by a person to induce another to enter into a contract, or with intent to deceive another party to a contract, constitutes actual fraud: 1. Intentional misrepresentation: "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true" (coming under this heading is an insured's false representation of good health, see 26 A.L.R. 3d 1061). 2. Negligent misrepresentation: "The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." 3. Concealment: "The suppression of that which is true, by one having knowledge or belief of the fact." 4. False promise: "A promise made without any intention of performing it." 5. "Any other act fitted to deceive." The purpose of this catch-all statement is suggested in Wells v. Zenz (1927), 83 C.A. 137:

> "Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another.

> No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and unfair way by which another is deceived. The statutes of California expressly provide that . . . any other act fitted to deceive is actual fraud." (See Witkin, Vol. 1, §316, pp. 265-266)

Civil Code section 1573 defines "constructive fraud" as:

> (a) "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him"; (b) "any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud." (Underscoring added)

As the court said in Estate of Arbuckle (1950), 98 C.A. 2d 562:

> "Fraud assumes so many shapes that courts and authors have even been cautious in attempting to define it. . . . In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another. . . . Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be treated - that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud." (Witkin, Vol. 1, § 319, pp. 268-269)

From the facts of record in the instant case, it appears that the claimant committed both an intentional misrepresentation (the assertion in his resume that his physical condition was "excellent") and a concealment (failure to disclose on his application for employment that he was at that time disabled and unable to work) of

material facts. Thus, we seem to have a situation in which the employer was induced to enter into a contract of employment with the claimant as the result of acts of the claimant constituting "actual fraud" within the definition set forth in Civil Code section 1572, subdivisions 1 and 3.

In this respect, the majority decision herein demonstrates an unfamiliarity with California law when the majority state at the bottom of page three:

> "In response to the employer's contention that the claimant's employment resulted from his misrepresentation, we find that the claimant made no misrepresentation. He merely failed to inform the employer of his emotional condition."

Not only does that majority statement ignore the undisputed fact that the claimant also made in his resume to the employer the declaration that his physical condition was "excellent," but it clashes with subdivision 3 of Civil Code section 1572, set forth above: "The suppression of that which is true, by one having knowledge or belief of the fact." (Emphasis added) These statutory provisions have been reiterated by the California courts:

> "The suppression of that which is true, by one having knowledge or belief of the fact, to deceive another, or to induce him to enter into a contract, constitutes actual fraud." Scofield v. State Bar of California (1965), 62 C. 2d 624 at 628; Barder v. McClung (1949), 93 C.A. 2d 692 at 697.
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> ". . . The fact represented or suppressed, as the case may be, is deemed material if it relates to a matter of substance and directly affects the purpose of the party deceived in entering into a contract. Schaub v. Schaub (1945), 71 Cal. App. 2d 467."
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> "False representations, the wilful suppression of material facts, and the making of a promise without any intention of

performing it, if committed by a party to a contract with intent to deceive another party thereto, or to induce him to enter into the contract, constitute fraud." Thomas v. Hawkins (1950), 96 C.A. 2d 377 at 379.

"A single material misstatement knowingly made with intent to influence another to contract will, if relied on by the other, afford as complete ground for relief as if accompanied by a multitude of other false representations." Del Vecchio v. Savelli (1909), 10 C.A. 79.

We do not deem it necessary to discuss exhaustively the remedies available under California law; suffice to say that the courts will do justice in favor of the party against whom fraud was employed (within the meaning of section 1572 or 1573 of the Civil Code) to induce him to enter into the contract. By the same token, the courts will not assist the party who has perpetrated the fraud to induce another into a contractual relationship. Civil Code section 3391 denies specific performance of a contract when sought by the party who uses "misrepresentation, concealment, circumvention, or unfair practices." And, Civil Code section 3517 sets forth the irrefutable maxim of jurisprudence that:

"No one can take advantage of his own wrong." (Emphasis added)

By their decision in this case today, the majority have not only overruled Appeals Board Decision No. P-B-78, but have nullified section 3517 of the Civil Code as well.

Perhaps, however, the majority have created a situation which will result in a dis-service to claimants who come within the purview of this case. Above, we considered primarily the legal elements of civil fraud in the contractual sense. The principal feature which transforms fraud in the contractual sense into the tort action for fraud and deceit is the incidence of damage to the party induced to enter into the contract (Civil Code section 1709; Harazim v. Lynam (1968), 267 Cal. App. 2d 127). Under Appeals Board Decision No. P-B-78, damage arising from the employment contract itself was unlikely, as the claimant was denied unemployment insurance benefits and the employer's reserve account was relieved of charges. But, under today's majority decision in the

instant case, claimants will be given unemployment insurance benefits and employers' reserve accounts will be subjected to charges. Thus, an employer who is induced to enter into an employment contract by the fraudulent misrepresentation or concealment of a claimant, may have a tort action versus the claimant to recover the higher unemployment tax necessitated by charges to the employer's reserve account.

In view of all the above reasons, we must enter our dissent to the decision of the majority.

CARL A. BRITSCHGI

HARRY K. GRAFE